Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

WILLIAM D. METT, MARVIN L. WISEMAN and CENTER ART GALLERIES - HAWAII, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The Ninth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DID THE NINTH CIRCUIT ERR IN RULING CONTRARY TO THE FIFTH CIRCUIT AND OTHER COURTS THAT PETITIONERS WERE NOT DEPRIVED OF THEIR RIGHT TO CONFLICT-FREE COUNSEL WHERE THEIR DEFENSE ATTORNEY IN THEIR FEDERAL PROSECUTION WAS SIMULTANEOUSLY REPRESENTING THEIR PROSECUTOR ON A STATE CHARGE?

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OPINION BELOW

The decision of the Ninth Circuit, filed September 19, 1995, is reported at 65 F.3d 1531 (9th Cir. 1995), and is reprinted at Appendix A. The final order denying a petition for rehearing and suggestion for rehearing en banc was issued May 3, 1996, and is reprinted at Appendix B. The District Court's order denying petitioners' motion pursuant to 28 U.S.C. § 2255 and Federal Rule of Criminal Procedure 33 was issued October 14, 1994, and is reprinted at Appendix C. The District Court's amending order was filed on October 18, 1994, and is reprinted at Appendix D.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit's opinion was filed on September 19, 1995. The petition is timely, rehearing having been denied by the Ninth Circuit on May 3, 1996. *See* Appendix B; Sup. Ct. R. 13.1.

STATEMENT OF THE PROCEEDING BELOW

In 1993, petitioners William Mett and Marvin Wiseman, owners and officers of petitioner Center Art Galleries – Hawaii, Inc. [hereinafter sometimes "Center Art"] were convicted in the District of Hawaii of multiple counts of mail and wire fraud in violation of 18 U.S.C. §§ 1341, 1343. Petitioner Mett was sentenced to three

years and fined $533,000. Petitioner Wiseman was sentenced to two and one-half years and fined $282,000. Petitioner Center Art was fined $1,031,000. Petitioners were ordered to pay joint restitution of $314,979. The Ninth Circuit affirmed in an unpublished opinion (*see* 991 F.2d 804 (9th Cir. 1993) (table)), and this Court denied certiorari. *Mett and Wiseman v. United States*, ___ U.S. ___, 114 S.Ct. 1542, 128 L.Ed.2d 194 (1994).

Those convictions were based on allegations that over a 13 year period, petitioners engaged in fraudulent sales of art reproductions of but four of the hundreds of artists whose work Center Art offered for sale during that time.

Petitioners filed a motion under 28 U.S.C. § 2255 and Federal Rule of Criminal Procedure 33 to vacate their convictions, arguing that a conflict of interest on their lawyer's part deprived them of their Sixth Amendment right to counsel. After holding an evidentiary hearing the District Court denied the motion. (Appendix C, D). The Ninth Circuit affirmed. (Appendix A).

STATEMENT OF FACTS

In April, 1988, attorney Benjamin Cassiday III was consulted by defense attorney Brook Hart regarding becoming involved as defense counsel in the Center Art case. The defendants were indicted on January 26, 1989. Five days later, on February 1, 1989, the prosecutor in this case, Leslie Osborne, was arrested on criminal charges for driving under the influence of alcohol and driving on the wrong side of the road. Two days after that, Cassiday

appeared in state court to represent Mr. Osborne in his DUI case.

Over the next several months Cassiday simultaneously represented both petitioners and their prosecutor, Leslie Osborne, in a variety of appearances and motions. On February 28, 1989, Cassiday filed a motion in federal court, thereby formally appearing as counsel for Center Art. Two weeks later, on March 14, 1989, Cassiday appeared on Mr. Osborne's behalf in *State v. Osborne* to enter a plea of not guilty on behalf of Mr. Osborne and to set the case for trial. Two weeks later, on March 31, 1989, Cassiday again filed a pleading on behalf of Center Art in federal court. The next month, on April 20th, Cassiday filed a motion in state court on Mr. Osborne's behalf to advance that case to April 26, 1989.

On April 26th, however, Mr. Cassiday failed to appear at the scheduled hearing on behalf of Mr. Osborne in state court. The next day, Mr. Osborne appeared *pro se* to enter a plea of guilty in his case. On that date, Mr. Osborne informed the state court that he was appearing *pro se* because of a "conflict" of interest that made Mr. Cassiday's "continued representation [of Mr. Osborne] impossible." Mr. Osborne, however, never informed *the district court* of that conflict.

The next week, on May 3rd, Mr. Cassiday and other defense attorneys filed the Omnibus Motion to dismiss on behalf of all defendants. Mr. Cassiday continued to represent Center Art throughout the federal criminal case. Furthermore, Cassiday made several appearances on behalf of Mr. Mett and Mr. Wiseman over the course of the case. Mr. Cassiday filed approximately 30 pleadings

on behalf of all defendants throughout the trial. Correspondingly, Mr. Osborne served Mr. Cassiday with numerous government pleadings.

Cassiday also shared confidential communications in numerous telephone conferences with defense counsels for Mett, Wiseman and Center Art, and Cassiday sat in on many discussions with defense counsels and the defendants at the offices he shared with Mr. Wiseman's chief counsel, Brook Hart.

Cassiday's representation of the defendants continued through trial. Cassiday acted as a jury selection consultant for all defendants. Cassiday also continued to correspond with prosecutor Osborne during trial.

In support of the § 2255 motion, the defense offered the declaration of ethics expert Professor Geoffrey C. Hazard, Jr. In that declaration Professor Hazard concluded after reviewing the relevant documents in this case that in his opinion Cassiday "had a clear and flagrant conflict of interest;" "the situation is literally a textbook case of conflict of interest." (G. Hazard & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* §§ 1.7.208, 1.7.308). Professor Hazard further declared that the failure to obtain a knowing and intelligent waiver of this actual conflict of interest "justifies setting aside the convictions under recognized principles of law."

An evidentiary hearing essentially confirmed the facts summarized above, while establishing others as to which both the district court and petitioners previously had been completely ignorant. Professor Hazard confirmed that Cassiday's actions in this case indicated that

he was acting as "co-counsel" for all the defendants. Since Cassiday participated in joint sessions with counsel for multiple defendants in jury selection, he owed a duty of loyalty to all of those clients.

The prosecution then called Benjamin Cassiday and Brook Hart. At the time of the hearing, both of these witnesses were being sued by Mett and Wiseman over the conflict of interest that was also the subject of the instant motion. Cassiday testified first. He admitted that, just prior to taking the stand, he had stated to an acquaintance that his intention in testifying was to "burn" the petitioners.

Cassiday essentially confirmed the above facts. He added that when Cassiday agreed to represent Osborne on February 2, 1989, Osborne's chief concern at this time was that his drunk driving prosecution be handled with the minimum of public disclosure and embarrassment.

In his testimony, Cassiday also revealed for the first time that sometime in March, 1989, the United States Attorney for the District of Hawaii, Daniel Bent, who was Mr. Osborne's boss, phoned him. Bent had "a problem" with Cassiday's joint representation of Osborne and the Center Art defendants. Bent told Cassiday that "I think you should withdraw from Les' [Osborne's] case." Bent's concern was that Cassiday's joint representation of Osborne and the Center Art defendants might require Osborne to withdraw from the Center Art prosecution. Cassiday felt uncomfortable discussing the case with Bent, but felt "my *duty was to the U.S. Attorney* at that time because I was representing him." As "a result of that conversation with the United States Attorney", Cassiday

heeded Bent's directive and agreed to withdraw from Osborne's case. Cassiday continued to make appearances in Osborne's case, however, until Osborne appeared for himself and asked to represent himself pro per because of a conflict of interest.

Subsequently, Cassiday worked on jury selection on behalf of all the Center Art defendants. He spent a week and a half on the joint selection of the jury. All decisions on challenges were made jointly. Cassiday was chosen to help with jury selection because of his expertise in this area and familiarity with local juries.

Brook Hart confirmed much of Cassiday's testimony. The joint defense team which included Cassiday, Mr. Fox and Mr. Weiner representing the corporation, Mr. Wing representing Mr. Mett and Mr. Hart representing Mr. Wiseman, put on a collective defense. They held joint strategy conferences.

SUMMARY OF ARGUMENT

The Ninth Circuit's opinion in this case decided an issue of first impression in that Circuit: whether an actual conflict of interest requiring reversal was created when an attorney represented simultaneously both the federal criminal defendants in this matter and the Assistant United States Attorney prosecuting these defendants, who then was facing his own prosecution in state court on drunk driving charges.

A similar issue has been decided only by two other courts, the Fifth Circuit and the Colorado Supreme Court.

Zuck v. Alabama, 588 F.2d 436 (5th Cir.), *cert. denied*, 444 U.S. 833 (1979); *People v. Castro*, 657 P.2d 932 (S.Ct. Colo. 1983). The question has arisen so rarely no doubt in part because the impropriety in simultaneous representation of adversaries seems obvious. Indeed, both *Zuck* and *Castro* not only condemned simultaneous representation of prosecutor and criminal defendant; they held it to be a violation of the right to counsel so grave as to require reversal of any criminal conviction resulting from the conflicted representation.

The lead opinion in this case creates a split in authority between the circuits by ruling that any conflict created by Benjamin Cassiday's simultaneous representation of AUSA Leslie Osborne and the defendants Osborne was prosecuting in this matter could not have tainted the conviction of these defendants.

Further, the lead opinion adopts a novel and unworkable distinction between an "adverse effect" of a conflict which requires a reversal of a conviction – which the opinion maintains did not occur here – and the "loss of a benefit," which it concedes was suffered by the defendants as a result of the conflict. Such distinction misinterprets this Court's precedents, is conceptually unworkable, and will lead to mischievous results.

Of equal importance is the fact that the majority opinion in this case not only fails to find simultaneous representation fatal to a resulting conviction, it declines even to disapprove it. At the same time, the concurring opinion deems such an arrangement acceptable, and does so in terms which go far beyond the context of this case,

and are at odds with the definition of an actual conflict found in the precedents of this Court.

The concurrence's ruling that no conflict existed is particularly troubling in a case in which defense counsel Cassiday admitted to a controlling loyalty to the United States Attorney, agreed to follow the prosecution's directive for the express purpose of protecting the U.S. Attorney's interests against those of Cassiday's other clients – petitioners here – and declared in Mr. Osborne's state prosecution that he was indeed suffering a conflict of interest, a fact he deliberately hid from the federal court judge trying petitioners.

This Court must grant review to resolve the conflict among the circuits and to clearly disapprove of this most flagrant violation of the right to independent, conflict-free counsel.

REASONS FOR GRANTING THE PETITION

I. BY FINDING NO REVERSIBLE ERROR WHERE DEFENSE ATTORNEY CASSIDAY WAS SIMULTANEOUSLY REPRESENTING PROSECUTOR OSBORNE IN OSBORNE'S OWN DRUNK DRIVING CASE, WHERE CASSIDAY FELT A PRIMARY DUTY OF LOYALTY TO OSBORNE AND OSBORNE'S BOSS – U.S. ATTORNEY BENT – AND WHERE CASSIDAY ADMITTED TO TAKING ACTIONS TO BENEFIT BENT IN HIS PROSECUTION OF HIS OTHER CLIENTS – PETITIONERS HEREIN – THE NINTH CIRCUIT OPINION CREATES A CONFLICT WITH THE FIFTH CIRCUIT'S OPINION IN *ZUCK V. ALABAMA*

Under this Court's authority, a defendant whose attorney suffered from a conflict of interest need not show that the conflict of interest at issue caused his conviction or resulted in specific damage to his case in order to obtain relief under the Sixth Amendment. As Chief Justice Burger explained for this Court:

> "[A] rule requiring a defendant to show that a conflict of interest . . . prejudiced him in some specific fashion would not be susceptible of intelligent, even-handed application. In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. [Citations omitted]. But in a case of . . . representation of conflicting interests the evil – it bears repeating – is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible

> pretrial plea negotiations and in the sentencing process. It may be possible in some cases to identify from the record the prejudice resulting from an attorney's failure to undertake certain tasks, but even with a [complete record] it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible. Thus, an inquiry into a claim of harmless error here would require, unlike most cases, unguided speculation.

Holloway v. Arkansas, 435 U.S. 475, 490 (1978) (original emphasis).

In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), this Court refined the test for reversal in conflict cases. This Court reiterated that a defendant "*need not demonstrate prejudice in order to obtain relief*" based upon a conflict of interest; this Court held, however, that the defendant must demonstrate that "a conflict of interest actually affected the adequacy of representation" or "adversely affected his lawyer's performance." *Id.* at 348, 349-350 (emphasis added). Alternatively, this Court stated that the defendant must show "that his counsel actively represented conflicting interests" as a "constitutional predicate for his claim of ineffective assistance." *Id.* at 350.

Until the instant case, only two reported decisions had ever addressed the egregious example of a defense attorney who was *simultaneously representing the prosecutor who was prosecuting his or her other client*. Both cases reversed finding inherent prejudice in actively representing these conflicting interests. *Zuck v. Alabama*, 588 F.2d

436 (5th Cir.), *cert. denied*, 444 U.S. 833 (1979); *see also People v. Castro*, 657 P.2d 932 (S.Ct. Colo. 1983).

In *Zuck*, the Fifth Circuit addressed a conflict which was more attenuated than the conflict in this case. It was not the same lawyer representing the defendant and prosecutor; rather, different lawyers in the same firm represented the defendant and the prosecutor. Also in *Zuck*, the law firm represented the prosecutor in a *civil* matter, rather than a criminal matter as was the case here. The Fifth Circuit nonetheless held that the "dual representation . . . created an actual conflict of interest." *Id.* at 439.

In *Castro*, the conflict was also less direct than that in the case at bar. In *Castro*, the defense attorney was simultaneously representing District Attorney Lovasio in two matters. One matter involved a recall petition regarding Lovasio's election as District Attorney; another involved an indictment filed against Lovasio for overspending his budget. 657 P.2d at 936. Although Lovasio's office prosecuted the defendant, the actual prosecution and appearances were handled by one of Lovasio's deputies. *Id.* at 936, 944. Thus, the actual prosecutor in the case, unlike Osborne, was not being represented by defense counsel. Despite the fact that the defense attorney's conflict was with the District Attorney rather than the trial prosecutor, the Court found an actual conflict. "A lawyer representing such conflicting interests cannot avoid being adversely affected at various stages of the criminal prosecution of the accused." *Id.* at 944-945. Thus, the Colorado Supreme Court reversed the conviction.

The *Mett* lead opinion suggests that *Zuck* is inconsistent with the Supreme Court's later opinion in *Cuyler*, which requires "that the defendant show the conflict had an adverse effect on the lawyer's performance." *United States v. Mett*, 65 F.3d 1531, 1534 n.2 (9th Cir. 1995). *Mett* ignores, however, that *Cuyler* states its requirement for reversal alternatively as a showing that defense counsel "actively represented conflicting interests," a showing established to the *Zuck* court's satisfaction. Thus *Zuck* is wholly consistent with the holding of *Cuyler*.

Moreover, as noted in *Zuck* and *Castro*, special considerations are inherent in a situation in which a defense attorney is simultaneously representing the very prosecutor who is prosecuting his or her other clients. The *Zuck* court noted that when a defense attorney simultaneously has represented his client's prosecutor, even an attorney of "noblest intentions . . . may have been tempted to be less zealous than [he] should have been in the presentation of the [defendant's] case." 588 F.2d at 440. The attorney "might be tempted to dampen the ardor of his defense in order to placate his other client." *Id.* Similarly in *Castro*, the court noted that

> [d]efense counsel . . . might be reluctant to incur the disfavor of her other client, the [prosecutor], by pressing hard for the best possible plea bargain for the defendant. Nor can a similar tension fail to make itself felt in defense counsel's performance during the trial itself.

657 P.2d at 945.

An equally troublesome danger of this situation is that the *prosecutor*, "in order to avoid any appearance of favoritism," might well take an unusually hard line on

plea bargaining or at various points during the trial which would disadvantage the defendant. *Castro*, 657 P.2d at 945. As both *Zuck* and *Castro* noted, the potential for such dampened ardor by the defense or overcompensation by the *prosecutor* is sufficient to raise an actual conflict.

> The extent to which such apprehension may have consciously or unconsciously manifested itself in defense counsel's performance is a matter we need not decide here. What is critical, in our view, is the presence of a real and substantial conflict that placed the defense attorney in a situation *inherently conducive to and productive of divided loyalties.*

Castro, 657 P.2d at 945. As the *Zuck* court concurred, "the mere existence of a temptation in the abstract" to dampen one's zealous representation, "is sufficient to preclude duality of representation." *Zuck*, 588 F.2d at 440; *see also People v. Jackson*, 167 Cal.App.3d 829, 832-833 (1985) (where defendant's trial counsel had been "dating" the prosecutor "subtle influences" may have compromised defense counsel's zealous advocacy). The *Mett* decision thus creates a clear conflict with the Fifth Circuit decision in *Zuck* (as well as the Colorado Supreme Court's decision in *Castro*) which requires review by this Court to resolve.

Additionally, the *Mett* decision introduces a novel and unworkable distinction into the law of "adverse effect": that between "harms" and "benefits" resulting

from conflicts. The opinion does not dispute that Cassiday on at least one critical occasion failed to act in petitioners' interest out of loyalty to Osborne,[1] but holds:

> [T]he purpose of the Sixth Amendment right to conflict-free counsel is to ensure that defendants are not harmed by their counsel's conflicts of interests. . . . We do not believe that being deprived of a potential benefit from an attorney conflict of interest should be counted as an adverse effect in the *Cuyler* test.

Mett, 65 F.3d at 1535.

This is a conceptually unsound distinction. For instance, one of the classic examples of an impermissible conflict of interest is posed by a defense lawyer confronting on cross-examination an adverse witness who is a former or present client. Full and vigorous examination may tread on confidences learned by counsel during representation of the witness; an examination which skirts those confidences shortchanges the loyalty the lawyer owes to the client he is now defending.

Yet under *Mett*, it appears that such defendant is not "harmed" by his counsel's refusal to disclose privileged information during cross-examination of the adverse witness who is a past or present client; rather the defendant is merely denied the "benefit" that he might otherwise enjoy from the conflict, because a non-conflicted lawyer would not be privy to the witness' confidences in the first

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[1] The lead opinion acknowledges that: "[C]assiday's loyalty towards Osborne arguably kept him from doing something – moving for Osborne's disqualification – which could perhaps have helped his client." *Mett*, 65 F.3d at 1535.

place. In fact, the case law universally condemns such instances of divided loyalty,[2] and the adverse effect test applies to the denial of "benefits" as well as the infliction of "harm." This Court must grant the writ and review this case in order to resolve the conflict among the circuits and rectify this dangerous distinction between "harm" and denial of "benefits."

II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW, WORTHY OF THIS COURT'S REVIEW, BECAUSE IT DECLINES TO DISAPPROVE OF THE CONFLICT HEREIN WHERE DEFENSE ATTORNEY CASSIDAY WAS SIMULTANEOUSLY REPRESENTING PROSECUTOR OSBORNE IN OSBORNE'S OWN DRUNK DRIVING CASE, WHERE CASSIDAY FELT A PRIMARY DUTY OF LOYALTY TO OSBORNE AND OSBORNE'S BOSS – U.S. ATTORNEY BENT – AND WHERE CASSIDAY ADMITTED TO TAKING ACTIONS TO BENEFIT BENT IN HIS PROSECUTION OF HIS OTHER CLIENTS – PETITIONERS HEREIN

As noted, each of the courts that have considered the propriety of simultaneous representation of criminal

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[2] *See State v. Reis*, 4 Haw.App. 327, 331, 666 P.2d 612, 616 (1983) (Concurrent representation of defendant and an adverse witness or hostile party constitutes actual conflict of interest as a matter of law); *In re Darr*, 143 Cal.App.3d 500, 509 (1983) (concurrent representation of defendant and witness); *Castillo v. Estelle*, 504 F.2d 1243 (5th Cir. 1974) (concurrent representation of defendant and an individual who was both a government witness and a victim); *United States v. LaVallee*, 282 F. Supp. 968 (E.D.N.Y. 1968) (concurrent representation of defendant and important government witness).

defendant and prosecutor have held it to constitute an actual conflict of interest based on a careful consideration of the pitfalls inherent in such an arrangement. In this case, those dangers were played out in starkly disturbing conduct. Cassiday stated in no uncertain terms that despite his position as counsel for petitioners, he felt his "primary duty of loyalty" was to the very attorney who was seeking to convict them. Further, when contacted by Osborne's boss, U.S. Attorney Daniel Bent, Cassiday stated unequivocally that his duty of loyalty to "the U.S. Attorney" led him to take actions specifically to further Bent's interest in prosecuting his other clients – the petitioners. Further, Cassiday's obligation as Osborne's counsel, to follow Osborne's desire to handle Osborne's DUI case as "discreetly" as possible, prevented Cassiday from even disclosing the conflict to the district court as required by Fed.R.Crim.P. 44(c);[3] Cassiday's obligation to Osborne prevented him from even disclosing the conflict to petitioners, thus sabotaging the attorney-client relationship with petitioners.

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[3] This failure to disclose also undermined the district court in its supervisory rule over the conduct of trials. "Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and *that legal proceedings appear fair to all who observe them.*" *Wheat v. United States*, 486 U.S. 153, 160 (1988). Here, that independent interest was stark indeed; no criminal conviction can appear fair when a lawyer entrusted with client confidences and duty bound to defend his client, was at the same time engaged in a confidential attorney-client relationship with the very prosecutor responsible for taking away his freedom, and taking actions at the behest of the prosecutor and his boss for the very purpose of securing and preserving a conviction of his other client.

The lead opinion in this case takes no position on whether the simultaneous representation here was improper, while the concurrence, without citing or discussing *Zuck* or *Castro*, inexplicably denies the existence of any conflict of interest. 65 F.3d at 1537 (Kleinfeld, J., concurring).

Furthermore, Judge Kleinfeld announces that he intends to revise the present state of conflict law, which he finds unsatisfactory: "Because the term is often used loosely without much analysis, to bad effect, it is useful to focus separately upon it." *Id.* The concurrence then sets out a definition of conflict of interest, assumedly novel for it is unaccompanied by citation:

> A conflict of interests arises when a lawyer's fiduciary duty to one client obligates him to act in a way contrary to the manner in which his fiduciary duty to another client requires.

Id. at 1538.

Yet this unprecedented statement of the conflict principle cannot withstand analysis. It limits the existence of conflicts of interests to those situations in which a lawyer violates a fiduciary duty to a client by acting as a result of divided loyalties in a way different from that in which he is *obligated* to act by professional standards. In the criminal context, what an attorney is *obligated* to do is only avoid the rendering of ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 692 (1984).

Thus, to win a conflict claim, a criminal defendant must prove that his counsel rendered ineffective assistance of counsel. That being so, conflict of interest under

the concurrence's standard would cease to be an independent basis on which to rest a claim of the deprivation of right to counsel, as it now is. *Compare Cuyler*, 446 U.S. at 348-350 *with Strickland*, 466 U.S. at 692. The consequences of this sea change in the law would be dramatic. It is now the case that a defendant's right to counsel has been violated if a lawyer fails to call that defendant to the stand for fear his testimony will damage another client of the same lawyer. Under the concurrence's test, to prevail on a conflict of interest claim the non-testifying defendant would have to prove not simply that divided loyalties affected the decision not to call the defendant, but that an unconflicted lawyer in the same position would have been "obligated" to put him on the witness stand, since only the violation of an "obligation" constitutes a conflict. That burden cannot be met, since there are nearly always tactical reasons which can justify not calling a defendant in his own behalf.

The majority's failure to disapprove of this egregious conflict, coupled with the concurrence's denial of the existence of a conflict (and its disturbingly novel statement of the law of conflict of interest) creates a dangerous precedent which must be rectified. Approval of Cassiday's conduct herein, threatens to upset the Due Process Clause's "balance of forces between the accused and his accuser." *Wardius v. Oregon*, 412 U.S. 470, 475 (1973). As *Wardius* held without dissent, the government has inherent advantages in criminal prosecutions; governments may not grant themselves additional ones. *Id.* at 475 n.9. Yet, here, where the government is allowed to direct the actions of a defense attorney, the government has granted

themselves just such a benefit, which the *Mett* Court refuses to condemn.

Failure to disapprove of U.S. Attorney Bent's conduct further undermines "the constitutional obligation of the State to respect the professional independence" of defense attorneys. *Polk County v. Dodson*, 454 U.S. 312, 321-322 (1981). It deprives a defendant of his or her right to the "guiding hand" of "counsel free of state control." *Id.* at 322.[4]

This Court must grant certiorari to clearly express disapproval of a decision which threatens the right to conflict-free counsel, as well as the right to counsel free of state control.

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[4] Once the right to counsel has attached and been asserted, the State must of course honor it. . . . [A]t the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel.

Maine v. Moulton, 474 U.S. 159, 170-171, 176 (1985).

CONCLUSION

For the reasons stated above, this petition for a writ of certiorari should be granted.

Dated: August 1, 1996

Respectfully submitted

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BY: DENNIS P. RIORDAN

Attorneys for Petitioners William D. Mett, Marvin L. Wiseman and Center Art Galleries – Hawaii, Inc.

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

William D. METT; Marvin L. Wiseman;
Center Art Galleries – Hawaii, Ltd.,
Defendants-Appellants.

No. 94-10503.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 8, 1995.

Decided Sept. 19, 1995.

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Marc J. Zilversmit, San Francisco, CA, for defendant-appellant Marvin L. Wiseman.

Elton John Bain, Kessner, Duca, Umebayashi, Bain & Matsunaga, Honolulu, HI, for defendant-appellant Center Art Galleries.

Leslie E. Osborne, Jr., Assistant United States Attorney, Honolulu, HI, for plaintiff-appellee United States of America.

Ephraim Margolin, San Francisco, CA, for amicus curiae National Association of Criminal Defense Lawyers.

John T. Philipsborn, San Francisco, CA, for amicus curiae California Attorneys for Criminal Justice.

Appeal from the United States District Court for the District of Hawai'i.

Before: POOLE and KLEINFELD, Circuit Judges, and GONZALEZ,* District Judge.

Opinion by Judge GONZALEZ; Concurrence by Judge KLEINFELD.

GONZALEZ, District Judge:

On February 1, 1989, Honolulu police arrested Assistant United States Attorney Leslie E. Osborne Jr. for drunk driving. Two days later, he hired solo practitioner Benjamin B. Cassiday III to represent him in connection with that charge. Sometime later in February, petitioner Center Art Galleries – Hawaii Inc. ("Center Art"), whom Osborne was prosecuting, asked Cassiday to represent it as local counsel. All parties appear to have waived any possible conflict orally, and Cassiday assumed the representation. Nothing was put in writing, and the district court was not informed.

In March 1989, the United States Attorney for Hawaii, Daniel Bent, learned of the conflict and telephoned Cassiday, urging him to withdraw from representing Osborne. Cassiday agreed to do so, but did not actually withdraw as counsel of record until just before Osborne pleaded guilty on April 27.

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* Honorable Irma E. Gonzalez, United States District Judge for the Southern District of California, sitting by designation.

On May 4, 1990, following a five-month trial before Judge Harold M. Fong, a jury convicted petitioners Center Art, Mett, and Wiseman of numerous counts of mail and wire fraud in connection with the sale of art works. Petitioners' primary counsel in that trial were Honolulu lawyer Brook Hart and three New York lawyers. Cassiday acted as local counsel and helped with jury selection. Petitioner Mett has declared that the defense attorneys' fees for the trial exceeded $5 million, of which Cassiday billed about $5,200.

On April 15, 1993, we affirmed petitioners' sentences on direct appeal. *United States v. Wiseman*, 991 F.2d 804, 1993 WL 118176 (9th Cir.1993) (table), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1542, 128 L.Ed.2d 194 (1994). They subsequently filed a motion for a new trial under Fed.R.Crim.P. 33 and a § 2255 petition, which the district court denied on October 14, 1994, after holding an evidentiary hearing. Petitioners appealed. We have jurisdiction under 28 U.S.C. §§ 1291 and 2255, and we affirm.

ANALYSIS

1. *Petitioner Center Art's Standing.*

The United States contends that petitioner Center Art lacked standing to bring its ineffective assistance claim. Defendants sentenced only to pay a fine cannot attack sentences by means of the state habeas statute, 28 U.S.C. § 2254. *Edmunds v. Won Bae Chang*, 509 F.2d 39, 40 (9th Cir.), *cert. denied*, 423 U.S. 825, 96 S.Ct. 39, 46 L.Ed.2d 41 (1975). The reasoning of *Edmunds*, based primarily on the phrase "in custody" in the statute, applies also to § 2255.

Petitioner Center Art was sentenced only to a fine. Consequently, Center Art had no standing to join in Mett and Wiseman's § 2255 petition.

Petitioners' motion in the district court was based on Fed.R.Crim.P. as well as on § 2255. A Rule 33 motion brought more than seven days after the verdict or finding of guilty must be based on newly discovered evidence. "[A] Rule 33 motion based upon 'newly discovered evidence' is limited to where the newly discovered evidence relates to the elements of the crime charged." *United States v. Hanoum*, 33 F.3d 1128, 1130 (9th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1702, 131 L.Ed.2d 564 (1995). Because Center Art proffered no evidence relating to the elements of the crime charged, Center Art could not raise its Sixth Amendment claim through a Rule 33 motion.

Center Art contends, however, that the district court could have reached the merits of its Sixth Amendment claim by construing its petition as seeking a writ of coram nobis, and that it actually put this theory to the district court in one of its papers. An individual no longer in custody may employ the rarely-used writ of coram nobis to make a Sixth Amendment assistance of counsel attack on his conviction. *United States v. Morgan*, 346 U.S. 502, 511-13, 74 S.Ct. 247, 252-54, 98 L.Ed. 248 (1954). There is no reason why a corporation, also not in custody and thus lacking access to § 2255 relief, should not be able to use the writ to seek redress for a constitutional error of that magnitude.[1] For this reason, we hold that petitioner Center Art had standing to raise its Sixth Amendment

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[1] *See United States v. Rad-O-Lite of Philadelphia Inc.*, 612 F.2d 740, 744 (3d Cir.1979) ("Courts regularly have allowed corporations to petition for coram nobis.").

claim, construing its petition in the district court as one for a writ of coram nobis.

2. *Violation of the Right to Conflict-Free Counsel.*

a. **The *Cuyler* Standard**

"We review de novo both the denial of a § 2255 motion and a determination that the prisoner was not denied his Sixth Amendment right to counsel." *Frazer v. United States*, 18 F.3d 778, 781 (9th Cir.1994). "We review for clear error any factual findings the district court made in deciding [a § 2255] motion." *Doganiere v. United States*, 914 F.2d 165, 167 (9th Cir.1990), *cert. denied*, 499 U.S. 940, 111 S.Ct. 1398, 113 L.Ed.2d 454 (1991).

The Sixth Amendment entitles criminal defendants to the effective assistance of counsel, which includes a right to conflict-free counsel. *See, e.g., Garcia v. Bunnell*, 33 F.3d 1193, 1198 & n. 4 (9th Cir.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1374, 131 L.Ed.2d 229 (1995); *United States v. Baker*, 10 F.3d 1374, 1399 (9th Cir.1993), *cert. denied*, ___ U.S. ___, 115 S.Ct. 330, 130 L.Ed.2d 289 (1994); *United States v. Allen*, 831 F.2d 1487, 1494 (9th Cir.1987), *cert. denied*, 487 U.S. 1237, 108 S.Ct. 2907, 101 L.Ed.2d 939 (1988).

In order to prove a violation of his Sixth Amendment right to conflict-free counsel, "a defendant who raised no objection [to the conflict] at trial must demonstrate that an actual conflict adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980). However, no prejudice need be shown. *Id.* at 349-50, 100 S.Ct. at 1718-19. In this

case, it is undisputed that petitioners did not object to the conflict at trial, so the *Cuyler* standard applies.[2]

b. Actual Conflict of Interest

The district court found that "petitioners' claim of an actual conflict is not completely meritless," but does not seem to have found squarely that there was an actual conflict. We assume without deciding that there existed an actual conflict of interest affecting not only Cassiday's client, Center Art, but also Mett and Wiseman.

c. Adverse Effect on Counsel's Performance

Even though *Cuyler*'s adverse effect prong does not require actual prejudice, "it remains a substantial

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[2] Petitioner Wiseman contends that he expressed his unhappiness with the conflict of interest at trial. The alleged expression of unhappiness occurred during jury selection: Wiseman asked Cassiday if he could get the prosecutor to "lighten up" because of the prior representation, and Cassiday responded that his representation of Osborne could not be used as a lever against him.

The *Cuyler* standard serves to distinguish this case from the pre-*Cuyler* case principally relied on by petitioners, *Zuck v. Alabama*, 588 F.2d 436 (5th Cir.), *cert. denied*, 444 U.S. 833, 100 S.Ct. 63, 62 L.Ed.2d 42 (1979). There, the defendants' law firm also represented the prosecutor in a civil matter. The Fifth Circuit in *Zuck* found that *any* "actual" conflict – and thus the conflict at issue in that case – renders a trial "fundamentally unfair" and is a per se due process violation. *Id.* at 438-39. This holding is, of course, contrary to *Cuyler*'s requirement that the defendant show that the conflict had an adverse effect on the lawyer's performance.

hurdle." *Maiden v. Bunnell*, 35 F.3d 477, 481 (9th Cir.1994). Our cases have not set up any formal test for determining whether counsel's performance was adversely affected. However, in *United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir.1992), we stated that "[t]o establish that a conflict of interest adversely affected counsel's performance, the defendant need only show that some effect on counsel's handling of particular aspects of the trial was 'likely.' " In *Miskinis*, for example, we listed as possible adverse effects the failure to put on certain defenses and witnesses. In *Allen*, one adverse effect was that counsel representing two defendants failed to argue that one of them had a more subordinate role in the criminal organization than the other. *See Allen*, 831 F.2d at 1497. The strength of the prosecution's case is not relevant to whether counsel's performance was adversely affected. *United States v. Hearst*, 638 F.2d 1190, 1194 (9th Cir.1980), *cert. denied*, 451 U.S. 938, 101 S.Ct. 2018, 68 L.Ed.2d 325 (1981). This is in accord with the rule that no showing of prejudice is required.

Petitioners contend that the conflict adversely affected Cassiday's performance in three ways: (1) other attorneys deferred to him in jury selection; (2) he failed to move for the prosecutor's disqualification on the basis of the conflict of interest; (3) he allowed Hart to make an inadequate disclosure of the conflict to Mett and Wiseman.

The first alleged inadequacy in counsel's performance, taking a lead role in jury selection, is not supported by any evidence whatsoever indicating that Cassiday did anything wrong in selecting the jury. A court cannot infer from this absence of evidence that it is

likely that Cassiday's performance in jury selection was adversely affected by the alleged conflict of interest.

The second of these alleged adverse effects has a certain superficial plausibility. After all, Cassiday's loyalty towards Osborne arguably kept him from doing something – moving for Osborne's disqualification – which could perhaps have helped his client. However, the purpose of the Sixth Amendment right to conflict-free counsel is to ensure that defendants are not harmed by their counsel's conflicts of interest. Its purpose is not to ensure that defendants benefit from those conflicts of interest. By complaining that Cassiday failed to move to recuse Osborne, petitioners are saying that they were deprived of a benefit that they might have expected to get from his conflict, and that this entitles them to a new trial. We do not believe that being deprived of a potential benefit from an attorney conflict of interest should be counted as an adverse effect in the *Cuyler* test. For this reason, we reject petitioner's contention that failing to move for Osborne's disqualification was an adverse effect.[3]

The third alleged adverse effect, Cassiday's failure to disclose the conflict adequately, is the most troubling. The

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[3] Petitioners specifically emphasize Cassiday's willingness to withdraw from representing the prosecutor when United States Attorney Bent called to ask Cassiday to withdraw. They suggest that at that point Cassiday was obligated to move to recuse the entire U.S. Attorney's office because of the conflict, and that by not doing so he somehow represented U.S. Attorney Bent's interest. Again, petitioners are saying only that they were deprived of a potential benefit they might have derived from Cassiday's conflict.

Cuyler test speaks of an adverse effect on counsel's performance. The term "performance" might be read expansively to encompass all of the things lawyers do for their clients, from drafting motion papers to providing moral support. *Miskinis* spoke of "counsel's handling of particular aspects of the trial." 966 F.2d at 1268. The reference to "trial" should obviously not be taken literally; pretrial activities such as plea bargaining are also part of counsel's performance for *Cuyler* purposes, as *Allen* illustrates.

However, we believe that an adverse effect in the *Cuyler* sense must be one that significantly worsens counsel's representation of the client before the court or in negotiations with the government. A conflict which causes problems of some sort in some facet of the attorney-client relationship (for example, by generating transient feelings of mistrust between attorney and client), but which ultimately has no significant impact on counsel's representation of the client before the court or in negotiations with the government, does not cause an adverse effect in the sense of *Cuyler*.[4] There is no

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[4] In cases where we have found an adverse effect in the sense of Cuyler, it has been an effect on counsel's representation of the client before the court or in negotiations with the government. *See Sanders v. Ratelle*, 21 F.3d 1446, 1453-55 (1994) (failure to interview key potential witness; advising witness to invoke Fifth Amendment at client's trial); *Miskinis*, 966 F.2d at 1268 (failure to put on certain defenses and witnesses); *Fitzpatrick v. McCormick*, 869 F.2d 1247, 1252-54 (9th Cir.) (failure to present exculpatory evidence), *cert. denied*, 493 U.S. 872, 110 S.Ct. 203, 107 L.Ed.2d 156 (1989); *Allen*, 831 F.2d at 1496-97 (misrepresenting the relative culpability of codefendants); *Brown v. United States*, 665 F.2d 271, 272 (9th Cir.1982) (inadequate cross-examination); *Hearst*, 638 F.2d at 1193 (failure

evidence here that the allegedly inadequate disclosure had the necessary impact on the representation petitioners ultimately received. For this reason, the allegedly inadequate disclosure was also not an adverse effect on counsel's performance in the sense of *Cuyler*.

In sum, petitioners have not met the "adversely affected" prong of the *Cuyler* test, and the district court properly denied their § 2255 petition on that basis.

d. The *Allen* Exception to the Adverse Effect Requirement

Petitioners cite some language from *United States v. Allen, supra,* which they argue carves out an exception to the adverse effect requirement. Allen's attorneys also represented unindicted bosses in his criminal organization. In *Allen* we stated that "[w]hen the conflicts are undisclosed, a defendant such as Allen will be unable to comply literally with the 'adversely affected' prong of *Cuyler*." 831 F.2d at 1497. We then pointed out that one of the conflicted attorneys stated that he "wouldn't exclude the possibility" that he had talked to an unindicted boss about the case, but that the contents of such conversations could not be disclosed because the unindicted bosses had refused to waive their attorney-client privilege. We noted that Allen "cannot know or prove to a reviewing court what his lawyers had learned from their other clients, or how that information caused counsel to

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to seek continuance, failure to seek change of venue, and putting client on the stand).

act or refrain from acting in certain ways." *Id.* The discussion concluded with the statement that "the actual conflict in this case is too glaring, and the nondisclosure of the conflict too significant, to require any further evidence that Allen's representation was adversely affected." *Id.*

The situation here, however, is quite different from that in *Allen*. First, the conflict in *Allen* was far more glaring, involving the attorney's strong bonds of loyalty towards other persons higher up in the same criminal scheme and a clear danger that the attorney would advise the client to reject advantageous plea bargains in order to keep him from informing on the crime bosses. Here, in contrast, the drunk driving case was completely unrelated to the federal prosecution of petitioners. The conflict, if indeed one existed here, gave rise at the very most to a vague general risk that Cassiday might "go easy" on the prosecution in some way because of his feelings of loyalty to AUSA Osborne. Second, in *Allen* the possibility of discussions with the other clients regarding the case could not be excluded, whereas here there is unrebutted testimony that Cassiday and Osborne never discussed the substance of the present case. For these reasons, the *Allen* exception to the adverse effect requirement does not apply here.

e. A Special Rule for Prosecutors?

Petitioners also contend that in the special case of simultaneous representation of a defendant and his or her prosecutor, no adverse effect should be required under *Cuyler*. They do not point out, and we cannot see, any

reason for making an exception for this particular kind of conflict.

Petitioner Mett contends that we should announce here a prophylactic rule requiring reversal if a prosecutor fails to disclose a known attorney conflict of interest to the district court. It is true that such disclosure has the benefit of allowing the district court to require that the conflict be waived on the record and to exercise its discretion under *Wheat v. United States*, 486 U.S. 153, 164, 108 S.Ct. 1692, 1699-1700, 100 L.Ed.2d 140 (1988), to disqualify an attorney when there is a serious potential for conflict. However, the proposed rule also has serious drawbacks. Although Mett portrays his proposed rule as analogous to Federal Rule of Criminal Procedure 44(c), requiring that dual-representation conflicts be waived on the record, Rule 44(c) is much simpler to apply because the existence of dual representation is obvious to all concerned. In contrast, with the broader rule petitioner Mett proposes, difficult factual questions might arise as to when the prosecutor became aware of a conflict, or indeed when a conflict really existed, in any particular case. For this reason, we decline to state any prophylactic rule such as petitioner Mett requests.

f. Relief Based on State Ethics Rules

A litigant may have a right to conflict-free counsel based on state professional ethics law rather than the Sixth Amendment. If attorneys appearing before a federal court are bound by a certain body of state ethics rules, litigants may seek disqualification of other parties' attorneys in the same proceeding for violation of the conflicts

provisions of those rules. *See Christensen v. United States District Court*, 844 F.2d 694, 697 & n. 6 (9th Cir.1988) (applying California professional ethics standards adopted by a local rule of the Central District to a disqualification motion; reserving the question of what would happen in the absence of such a local rule). Petitioners contend that the alleged conflict at issue here violated their rights under state professional ethics rules.

Postconviction remedies under § 2255 are limited to redressing a lack of jurisdiction by the sentencing court, a constitutional violation, and "any error of fact or law of the 'fundamental' character that renders the entire proceeding irregular and invalid." *United States v. Addonizio*, 442 U.S. 178, 186, 99 S.Ct. 2235, 2241, 60 L.Ed.2d 805 (1979). For this reason, persons seeking postconviction relief on the basis of attorney conflicts of interest are limited to asserting their Sixth Amendment right to conflict-free counsel. Violations of other rights they may have had at trial, such as those arising under state ethics rules, are not redressable under § 2255. For this reason, even if the alleged conflict here violated petitioners' rights under state professional ethics rules (which we do not decide), that was not a proper basis for granting the § 2255 petition.

g. Knowing and Voluntary Waiver

The United States contends that petitioners knowingly and voluntarily waived their right to conflict-free counsel, as the district court found. Because we are able to affirm the district court's denial of the petition on the

ground that petitioners have not met the *Cuyler* standard, we do not reach this issue.

3. ***Impermissible Double Counting in Sentencing.***

Petitioner Mett contends that he was sentenced improperly. The district court gave him a four-level upward adjustment for organizing or supervising more than five persons under U.S.S.G. § 3B1.1, together with a two-level upward adjustment for more than minimal planning under § 2F1.1(b)(2). Mett contends that this is impermissible double counting, but he recognizes that we held it to be permissible in *United States v. Kelly*, 993 F.2d 702, 704-05 (9th Cir.1993). We are bound by that holding and therefore must reject petitioner Mett's argument.

AFFIRMED.

KLEINFELD, Circuit Judge, Concurring:

I concur in the persuasive analysis by Judge Gonzalez. I write separately to illuminate a different path to the same result. The majority assumes without deciding that there was a conflict of interest. All three of us agree that, in that event, adverse effect is still necessary and did not exist. I would not even reach the issue of adverse effect, however, because I think there was no conflict of interest. Because the term is often used loosely without much analysis, to bad effect, it is useful to focus separately upon it.

Mr. Cassiday represented two different people whose interests might cause them to harbor ill feeling toward each other, a prosecutor and a defendant. But on the matters in which he represented them, neither had an

interest in having Mr. Cassiday conduct his advocacy in a manner adverse to the interest of the other. A conflict of interests arises when a lawyer's fiduciary duty to one client obligates him to act in a way contrary to the manner in which his fiduciary duty to another client requires. Mr. Osborne's drunk driving case would lead to no better or worse results depending on what Mr. Cassiday did in Center Art Gallery's case, nor would Center Art Gallery's case be helped or harmed by what happened to Mr. Osborne in his drunk driving case. Neither client would benefit from the suffering of the other.

A lawyer's duty to avoid conflict of interests arises from agency law. The ancient principle is that "[n]o man can serve two masters." Matthew 6:24. The contemporary statement is that an agent's fiduciary duty requires him to "act solely for the benefit of the principal in all matters connected with his agency," and "not to agree to act during the period of his agency for persons whose interests conflict with those of the principal in matters in which the agent is employed." Restatement 2d, Agency §§ 387, 394. Conflict of interests is not a matter of whether a lawyer's clients like each other, or whether the untutored may think it odd for a lawyer to be representing unlike clients.

An untutored journalist might "chortle," as Center's lead counsel said Mett and Wiseman did, upon learning that Center's defense lawyer represented the prosecutor in a drunk driving case. It would be amusing, in a gossip column, that Center's prosecutor was himself being prosecuted, and that the same lawyer represented both. The United States attorney would naturally be troubled by the dual representation, and would want to avoid having

people laugh at the expense of his office. But that is a political and prudential concern of the United States Attorney, not a conflict of interests for the defense attorney. Neither of Mr. Cassiday's clients, Center or Mr. Osborne, had an interest for which Mr. Cassiday was engaged which would be helped or harmed by the chortling.

Analytic error in interpreting conflict of interests causes injustices. For example, if a prosecutor gets arrested, he needs an experienced local lawyer as much as any other defendant, and cannot get one if they all imagine that they are "conflicted out." Likewise, if people confuse conflict of interests with amusing juxtaposition, genuine conflicts of interest are likely to be overlooked.

There would be nothing in the gossip columns if a defense lawyer represented two defendants in the same case. It would seem natural to the untutored that a criminal defense lawyer would represent multiple criminal defendants. Yet that is the situation most commonly fraught with conflict of interest, actual conflict, not just the possibility that someone not represented by the lawyer might be embarrassed.

"No one should be represented by an attorney who is making him the 'fall guy' by design." *United States v. Allen*, 831 F.2d 1487, 1497 (9th Cir.1987). A common defense strategy is to "roll over," that is, obtain leniency for one defendant in exchange for his testimony against another. Each potential "fall guy" has an interest in having his attorney persuade the other defendants to maintain silence.

Some criminal defense attorneys are uncomfortable with running their offices as what they call "snitch factories," and prefer not to obtain lenience for the clients they represent by putting others whom they do not represent in harm's way. Yet a criminal defense lawyer's professional responsibility to his client may require him to do just that. It would be a conflict of interests for the lawyer to represent the potential target of the deal, because then his obligation to the target would obligate him to act contrary to his duty to the potential "snitch." *Cf. United States v. Caro*, 997 F.2d 657 (9th Cir.1993) (conflicting interests of defendants in "package deals").

Mr. Cassiday had no obligation to Mr. Osborne arising out of Mr. Osborne's drunk driving case to make Center a "fall guy," or otherwise breach his fiduciary obligation to Center. The Supreme Court in *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980), held that "the *possibility of conflict* is insufficient to impugn a criminal conviction" and "[i]n order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an *actual conflict* of interest adversely affected his lawyer's performance." *Id.*, emphasis added. In this case, there was at most a "possibility of conflict," not an "actual conflict."

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM D. METT; MARVIN L. WISEMAN, CENTER ART GALLERIES-HAWAII, INC., Defendants-Appellants.	No. 94-10503 D.C. No. CR-89-00125-HMF ORDER (Filed May 3, 1996)

Before: POOLE and KLEINFELD, Circuit Judges, and GONZALEZ, District Judge.*

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no active judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Irma E. Gonzalez, United States District Judge, for the Southern District of California, sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM D. METT AND MARVIN L. WISEMAN, Defendants.	CR. NO. 89-00125 HMF (Filed Oct. 14, 1994)

ORDER DENYING DEFENDANTS' MOTION FOR A NEW TRIAL, FRANKS HEARING, AND MODIFICATION OF SENTENCE

On October 10 and 11, 1994, the court heard defendants' William D. Mett ("Mett"), Marvin L. Wiseman ("Wiseman"), and Center Art Galleries, Hawaii, Inc. ("Center Art") petition for habeas corpus wherein defendants moved for a (1) new trial pursuant to Fed.R.Crim.P. 33; (2) *Franks* hearing, and (3) to modify their sentences (collectively "defendants' motions"). For the reasons detailed below, the court DENIES the petition.

BACKGROUND

Petitioners Mett, Wiseman, and Center Art have been convicted of numerous counts of mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343. The convictions were based on sales of fraudulent art work conducted through Center Art. Mett was sentenced to three years'

imprisonment and a $533,000 fine. Wiseman was sentenced to two and one-half years' imprisonment and fined $282,000. Center Art was fined $1,031,000. The Court of Appeals for the Ninth Circuit affirmed the convictions on April 15, 1993 and denied rehearing November 24, 1993. The Supreme Court denied certiorari on April 19, 1994.

On June 6, 1994 this court granted Mett and Wiseman a 120 day stay of execution to settle their personal affairs and to attempt to resolve as many of the remaining claims against themselves and Center Art as possible. On September 1, 1994, approximately one month before mittimus, Mett and Wiseman filed the instant motions. Center Art joined in the motions on September 19, 1994.

Petitioners now move this court for a new trial or to modify their sentences on four grounds. First, petitioners claim that their right to counsel was compromised by a conflict of interest because one of their defense attorneys simultaneously represented Center Art in the federal criminal case while representing the prosecuting attorney charged in an unrelated state criminal matter. Second, petitioners claim that the government failed to reveal exculpatory evidence to the defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Third, petitioners allege that the affidavit in support of the search warrant contains material omissions and misstatements which may have been intentionally or recklessly made, thus entitling petitioners to a *Franks* hearing. Fourth, petitioners argue that their sentences should be reduced because this court misapplied the federal sentencing guidelines.

STANDARD OF REVIEW

I. Habeas Corpus

28 U.S.C. § 2255 provides, in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Because the scope of collateral attack of a sentence under § 2255 is limited, it does not encompass all claimed errors in conviction and sentencing. *United States v. Addonizio*, 442 U.S. 178, 185 (1979). Habeas corpus is available to review convictions and sentences entered by a court without jurisdiction or where constitutional error is alleged. It also allows a petitioner to challenge an error of law or fact – however, such challenge cannot provide the basis for collateral attack unless the claimed error constituted a fundamental defect which inherently results in a complete miscarriage of justice. *Id.* (citations omitted; *Davis v. United States*, 417 U.S. 333 (1974).

II. Motion for New Trial

The court may order a new trial upon motion by the defendant "if required in the interest of justice." Fed.R.Crim.P. 33.

ANALYSIS

I. Conflict of Interest

A. Introduction

Petitioners claim that their right to counsel was compromised because one of their attorneys, while acting as local counsel for Center Art, simultaneously represented the federal prosecutor in an unrelated criminal matter. Defendants argue that such simultaneous representation denied them effective assistance of counsel, requiring this court to set aside their convictions.

The facts of the alleged simultaneous representation are as follows: In January of 1989, Leslie Osborne ("Osborne"), the assistant U.S. Attorney prosecuting the case against Mett, Wiseman and Center Art, retained Honolulu attorney Benjamin B. Cassiday III ("Cassiday") to represent Osborne in a state drunk driving proceeding. Cassiday appeared in court on behalf of Osborne on February 3, 1989 for an arraignment and plea. Cassiday also appeared in court on behalf on Osborne on March 14, April 20, and April 26 to continue the proceeding because Osborne was out of town. On April 27, 1989, Osborne appeared before the state court *pro se*, and moved to release Cassiday as his counsel. Cassiday's representation of Osborne thus terminated on April 27, 1989.

In February 1989, Honolulu attorney Brook Hart ("Hart") discussed with Cassiday the possibility of acting as local counsel for Center Art in the federal prosecution. Cassiday spoke with Osborne regarding the possibility of an existing conflict of interest. Osborne responded that, so long as Cassiday informed Center Art of Cassiday's

representation of Osborne, he (Osborne) did not believe there would be a problem. Sometime in February, Cassiday also spoke with U.S. Attorney Dan Bent ("Bent"), who expressed concern over the potential conflict. Bent did not testify, and it is unclear whether this conversation had any effect on Cassiday's decision to withdraw from representation of Osborne.

Cassiday filed a *pro hac vice* motion on behalf of Center Art on February 23, 1989. *See* defendants' motion at Exhibit A. Cassiday did not again appear in court on behalf of Center Art until May 1989, well after his limited representation of Osborne concluded.

B. Discussion

Where a claim of ineffective assistance of counsel is based on a conflict of interest, a defendant who did not raise an objection to the conflict at trial must show (1) that an actual conflict existed, and (2) that the conflict adversely affected his lawyer's performance. *Cuyler v. Sullivan*, 446 U.S. 351, 348 - 350 (1980). Once the defendant makes such a showing, he need not demonstrate actual prejudice – prejudice will be presumed. *Id.* However, the mere possibility of a conflict is insufficient to overturn a criminal conviction. *Id.; see also United States v. Sutton*, 794 F.2d 1415, 1419 - 1420 (9th Cir. 1986).

The record indicates that Cassiday appeared in court on behalf of Center Art in February and March 1989, and on behalf of Osborne in February, March, and April 1989. *See* defendants' motion at Exhibits B, C, D, F, G, H. Although the extent of Cassiday's representation in both

matters appears limited, there *was* a period of simultaneous representation. Accordingly, petitioners' claim of an actual conflict is not entirely meritless. Indeed, the Court of Appeals for the Fifth Circuit has held that where, as in the instant case, a law firm simultaneously represents a defendant and the prosecuting attorney in an unrelated matter, an actual conflict exists. *See Zuck v. Alabama*, 588 F.2d 436 (5th Cir. 1979).[1]

However, even if the court were to find an actual conflict in the present case, petitioners would still have to demonstrate that any potential conflict had an adverse effect on Cassiday's performance. *See Cuyler*, 446 U.S. at 349. Based on the trial record and the evidence presented at the hearing, petitioners have failed to demonstrate such an adverse effect.

Petitioners identify two factors to demonstrate the adverse effects of Cassiday's alleged conflict: "the *possibility* of 'dampened ardor' and the *potential* for the prosecution to overcompensate for any appearance of favoritism." Defendants' motion at 12 (emphasis added). By petitioners' own characterization, these factors merely demonstrate the *possibility* of a conflict, which is an insufficient basis for overturning a criminal conviction. *Id.* (citing *Dukes v. Warden*, 406 U.S. 250 (1972), wherein the Court denied habeas corpus relief to a defendant who failed to "identify an actual lapse in representation"); *United States v. Allen*, 831 F.2d 1487, 1494 (1987).

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[1] The Ninth Circuit has not addressed the issue of a conflict of interest in a similar fact pattern.

Furthermore, on the record before the court, defendants would be hard-pressed to identify any actual adverse effects of Cassiday's representation. Cassiday and Hart both testified at the hearing that Cassiday did not participate in defense strategy planning, and was retained so that Center Art would have a local address available for court filings. The court's own observations during the five month trial indicate that Cassiday's role was limited – he seldom appeared at trial and was present mainly during selection of the jury. The defendants were ably represented during the jury selection by Hart, a well-respected Honolulu criminal defense attorney, and John Rusty Wing, former assistant U.S. Attorney in New York and former Chief of that office's Business Fraud Unit. Accordingly, petitioners have failed to satisfy the standard in *Cuyler* necessary to establish their ineffective assistant of counsel claim.

Moreover, the government offered proof at the hearing that there was a knowing and voluntary waiver of any "arguable conflict" potentially caused by Cassiday's representation of Osborne. Cassiday testified that he notified Center Art's attorneys of his representation of Osborne – that he had appeared on behalf of Osborne and was intending to assist Osborne with entry of a guilty plea. Hart discussed the matter with all of the attorneys involved and with the defendants themselves.

At the hearing, Mett and Wiseman gave testimony which contradicted that of Cassiday and Hart. In addition, both defendants claimed that, during the trial, Hart informed them that he (Hart) had represented Osborne sometime before the Center Art prosecution. The court is satisfied that Hart never represented Osborne.

A defendant may waive his right to conflict-free counsel, provided the waiver was knowingly and intelligently made. *Allen*, 831 F.2d at 1494. The testimony of Cassiday and Hart was persuasive, and demonstrated sufficiently that the defendants made a knowing and voluntary waiver.[2] Therefore, because the government proved waiver, petitioners' arguments on the conflict issue are not only meritless, but moot.

II. Brady Violation

A. Introduction

Petitioners claim that the government failed to disclose exculpatory information gathered during an investigatory trip made in October 1988. The trip in question was made by U.S. Postal Inspector Ellis ("Ellis") to the home of Salvador Dali ("Dali"), the purported author of the fraudulent art work sold by Center Art, to investigate the Center Art case on behalf of the U.S. Attorney's offices in New York and Hawaii. Ellis traveled to Europe in October 1988 to interview witnesses in Scotland, France, Switzerland and Spain. Ellis brought with him to Europe some of the Center Art Dali lithographs involved in the criminal prosecution, and showed the lithographs to potential trial witnesses. While in Spain, Ellis went to Dali's home and spoke with members of Dali's household; however, Ellis did not actually meet with Dali.

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[2] The court notes that Mett is a licensed attorney, and finds the statement in his affidavit that defense counsel did not inform him "of the nature of conflict of interest law" somewhat disingenuous. *See* Defendants' reply to Government's opposition, Exhibit X.

Petitioners now claim that Ellis did in fact obtain exculpatory information during his trip to Spain. They argue that disclosure of such information was required by *Brady v. Maryland*, 373 U.S. 83 (1987), and that the Government's failure to comply with *Brady* requirements constituted a violation of due process.

B. Discussion

In *Brady*, the Supreme Court held that:

> [T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

Brady, 373 U.S. at 87. Thus, to demonstrate a due process violation, petitioners must show that the prosecution suppressed evidence, and that such evidence was material to guilt or punishment.

Petitioners advance two theories to support their claim that evidence allegedly suppressed by the government was material. First, petitioners argue that Ellis did meet with Dali during his trip to Spain, and that during this meeting Dali authenticated several Center Art lithographs by signing his signature on the back. In the alternative, petitioners claim that someone else at Dali's residence reviewed the lithographs and signed them, possibly with Dali's permission or under Dali's authority. The sole basis for petitioners' theory is an unidentified signature found on the back of each of four lithographs. *See* defendants' motion, Exhibit R (Identifying the four

lithographs as GX# 1315, GX# 1316, GX# 1317, and GX# ART 1991).

Petitioners' claim that Ellis met with Dali and obtained Dali's signature is wholly without merit. The government offered proof at trial that Ellis was unable to meet with Dali during the trip to Spain. At the hearing, Ellis testified that he had visited Dali's home and had met with members of Dali's household, but had been unable to meet with Dali. The court believes Ellis who testified that he never met with Dali and did not obtain Dali's signature during the trip to Spain.

In addition, the government presented extensive testimony at the trial regarding the lack of authenticity of the Center Art prints, Dali's inability to sign his own name or participate in the print process, and the millions of forged Dali signatures in the art world. Thus, there is simply no evidence to support the proposition that the signatures on the back of the four lithographs are Dali's.

Similarly, petitioners' claim that someone else in Dali's household signed Dali's name, with or without the artist's authority, does not support a *Brady* claim. Ellis went to Dali's home and showed several Center Art lithographs to the members of Dali's household. Each person with whom Ellis spoke indicated that Dali did not participate in the creation of the lithographs. In case any of these individuals were called to testify at trial, Ellis obtained their signatures on the back on the prints, along with the stamp "Torre Galatea," the name of Dali's home.

This information is hardly exculpatory. On the contrary, it is further evidence that the Center Art prints were fakes. Petitioners claim appears to be based on their

belief that one of those signatures *must* have been made by Dali or at Dali's direction, a proposition that is simply not supported by the record or any new evidence.

Moreover, there is no indication that the government suppressed the four lithographs in question – two were admitted into evidence in January of 1990, and the government contends that all four exhibits were always available to the defense. The defense had ample opportunity at trial to introduce evidence of its own regarding the authenticity of Center Art lithographs, including the four upon which petitioners now rely. However, at the conclusion of the government's case, the defense rested after offering only one witness – the videotaped testimony of Anthony Quinn.

Indeed, the cases cited by petitioners merely illustrate the complete lack of foundation for their *Brady* claim. For example, in *United States v. Young*, 17 F.3d 1201, 1203 (9th Cir. 1994), the prosecution presented testimony that police found incriminating evidence taped under the dashboard of defendant's truck. After the verdict, the arresting officer (who had been on vacation and was thus unavailable at trial) informed defense counsel that the evidence was not found taped under the dashboard, but in a bag in the cab of defendant's truck, and that before she left for vacation, she had informed the prosecutor to this effect. *Id.* The subsequent *Brady* motion was based on the officer's affidavit. *Id.* In the present case, petitioners offer no evidence similar to the officer's affidavit in *Young* on which to base their *Brady* claim.

Similarly, in *United States v. Kojayan*, 8 F.3d 1315, 1318 (9th Cir. 1993), the *Brady* claim was premised on the

prosecution's failure to disclose that a co-conspirator had entered into a cooperation agreement with the Government. In support of the claim, the defendant offered a copy of the cooperation agreement, which had previously been unavailable to the defense. *Id.*

Thus, in both *Young* and *Kojayan,* the defendants offered substantiated evidence, which had been unavailable at trial, in support of their *Brady* motions. Petitioners here offer only their unsubstantiated conclusion that the signatures on the back of four government exhibits – two of which were introduced at trial and all of which were available to the defense at all times – are the signatures of Dali or his representative, and that such signatures indicate Dali's authentication of the lithographs. Accordingly, petitioners' *Brady* claim is unsupported by any evidence and does not entitle petitioners to the requested relief.

III. Franks Hearing

A. Introduction

Petitioners move this court for a *Franks* hearing, presumably to contest the validity of the search warrant under which the government seized evidence used in the criminal prosecution. In April 1987, evidence was seized from Center Art's warehouses and galleries under authority of six separate search warrants. *See In re Motion for Return of Property,* 681 F.Supp. 677 (D. Hawaii 1988). Each of the six warrants was supported by the affidavit of U.S. Postal Inspector Richard Portmann (the "Portmann affidavit"). *Id.* Petitioners claim that the Portmann affidavit contained false statements and material omissions intentionally or recklessly made. As a result of these

allegedly false statements, petitioners claim that they are entitled to a *Franks* hearing.

B. Discussion

In *Franks*, the Supreme Court held that:

> [W]here the defendant makes a substantial showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request.

Franks v. Delaware, 438 U.S. 154, 155 – 156 (1978). Thus, in the instant motion petitioners must show not only that statements in the Portmann affidavit were false, but that they were intentionally or recklessly included in the affidavit. In addition, petitioners must show that without the allegedly false statements the affidavit does not establish probable cause.

In support of their claim, petitioners argue that, before preparing the affidavit, Portmann had consulted with three individuals, Michael Stout, A. Reynolds Morse, and Albert Field, each of whom had made exculpatory statements regarding certain Center Art lithographs. This contention is based on excerpts of trial testimony given by these three witnesses. *See* defendants' motion at 44-45. In addition, petitioners claim that the Portmann affidavit fails to mention exculpatory information contained in tape recorded conversations between undercover agents and Center Art employees.

Petitioners' claims are unsupported by the record. First, although the above-named witnesses provided some testimony which was favorable to petitioners' authenticity claims at trial, these witnesses and others also gave very damaging testimony. *See* United States' motion in opposition, 9-10, Exhibit 2. The fact that contradictory evidence was presented at trial does not support the conclusion that Portmann knew or should have known that the expert opinions included in the search warrant affidavit were false. Indeed, the weight of the evidence at trial suggests exactly the opposite – that the art work was in fact fraudulent and the experts relied upon by Portmann were correct. For petitioners to prevail, they must make a preliminary showing that the experts provided Portmann with exculpatory information *before* he prepared the affidavit, and that such information was intentionally or recklessly withheld. Petitioners have failed to make such a showing.

In addition, petitioners' claim that the Portmann affidavit omitted exculpatory statements by Center Art employees is simply not supported by the evidence. The alleged exculpatory statements are as follows: Center Art personnel told the agents that Dali "didn't do the original lithography – very few artists do their own graphic work – and the Dalis are all done by professional lithographers." Defendants' motion at 47. Contrary to petitioners' argument, these statements are referenced in the Portmann affidavit in items 68 and 69. *See* Portmann affidavit at 22 (stating at item 68 that "she [Center Art employee Mary Pat Larsen] stated that Dali had nothing to do with the technical part of the printing," and at item 69, "Dalis are all done by professional lithographers").

Furthermore, the fact that some of the statements in the affidavit were contradicted by trial testimony does not necessitate a *Franks* hearing. *Franks* requires that statements in a search warrant affidavit be truthful – not in the sense that every fact recited therein is necessarily correct, but that the information is believed or appropriately accepted by the affiant. *Franks*, 438 U.S. at 165. Petitioners have not made a preliminary showing that Portmann intentionally or recklessly made false statements, or that he included information from other sources which he should not have "believed or appropriately accepted." *Id.*

Moreover, even if the allegedly false statements were stricken and the alleged omissions included, the Portmann affidavit would still support a finding of probable cause. Assuming the statements cited by petitioners regarding the five Dali images were removed, statements regarding *eleven* additional Dali images or sculptures would remain. Assuming the trial testimony of A. Reynolds Morse and Albert Field were included, there would still remain the opinions of three additional experts[3] who concluded that the Center Art Dalis were fake, as well as the damaging statements made by Morse

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[3] Petitioners object to one of the experts – Hautecloque – because the Portmann affidavit did not include a statement of Hautecloque's qualifications. Hautecloque was apparently consulted by one of the victims, before becoming involved in the federal investigation. Portmann's statements regarding Hautecloque thus appear to have come from information provided by one of the victims, and petitioners have not shown any reason why Portmann should not have relied on this information.

himself. *See* Portmann affidavit at 17 (wherein Morse is described as examining the image "Christ of St. John" and subsequently informing the purchaser that she had been "ripped off").

In addition, the statements made by eight victims regarding numerous purchases of fraudulent art work, false promises made during the sales process, and settlement agreements requiring these victims to remain silent about the fraud, would remain, as would the information obtained by undercover agents. *See Id.* at 8-19. Statements regarding Dali's examination of photographs of two purportedly original works sold by Center Art, and his signature under the Spanish word "falso" would also remain. *See id.* at 15-16 (items 46 and 48). The affidavit would thus support a finding of probable cause as to the Dali art work peddled by Center Art. Accordingly, petitioners are not entitled to a *Franks* hearing.

IV. Calculation of Petitioners' Sentences under the Sentencing Guidelines

A. Introduction

Petitioners claim that the court erred in calculating their sentences. Petitioners argue that this court, in increasing Mett's and Wiseman's sentences for acting as organizers or leaders in the scheme to defraud, misapplied § 3B1.1, of the United States Sentencing Guidelines ("USSG"). In the alternative, petitioners argue that their sentences must be reduced because a second upward adjustment pursuant to USSG § 2F1.1(b)(2) constituted impermissible "double counting."

B. Discussion

1. The Section 3B1.1 Claim

Petitioners' sentences were adjusted upward four levels pursuant to USSG § 3B1.1. This section provides adjustments to the level of offense based on the defendant's role in committing the offense. *See* USSG § 3B, Introductory Comment (1987, as amended 1990, 1992). The rule states in relevant part:

> *Aggravating Role*
>
> Based on the defendant's role in the offense, increase the offense level as follows:
>
> (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

USSG § 3B1.1 (1987, as amended 1991, 1993). The Introductory Commentary to the rule suggests, and the Ninth Circuit has held, that § 3B1.1 applies where more than one participant was involved in commission of the offense. *See* USSG § 3B, Introductory Comment (1987, as amended 1990, 1992); *United States v. Anderson*, 942 F.2d 606, 616 (9th Cir. 1991) ("adjustments for role in the offense are only appropriate when more than one person is criminally responsible for committing the offense"). Thus, petitioners' contention that § 3B1.1 is *only* applicable where the defendant supervises five or more criminally responsible individuals is wholly without merit.

Even if the court were to accept this contention, it was obvious to the court at trial that 5 or more employees

of Center Art were criminally responsible for the fraudulent activities, and that these employees took their directions from Mett and Wiseman. As defined in the rule, participants do not have to be codefendants. The Application Notes which follow the rule define "participant" as "a person who is criminally responsible for the commission of the offense, but *need not have been convicted.*" *Id.*, Application Note 1 (emphasis added). The activities of Mett and Wiseman fit squarely within the supervisory requirement of § 3B1.1.

In addition, the Center Art fraud was "otherwise extensive." The Application Notes to § 3B1.1 discuss the "otherwise extensive" requirement:

> In assessing whether an organization is "otherwise extensive," *all persons involved during the course of the entire offense* are to be considered. Thus, a fraud that involved only three participants *but used the unknowing services of many outsiders* could be considered extensive.

Id., Application Note 3 (emphasis added). The Ninth Circuit has held that the Application Notes must be considered when applying the USSG. *United States v. Anderson*, 942 F.2d 606, 612 (9th Cir. 1991). The record demonstrates that Mett, Wiseman, and Center Art were each criminally responsible for the fraudulent art sales, and that their activities used the "unknowing services" of many people involved in the production and sale of the art work. Thus, their activities are "otherwise extensive" within the rule.

Petitioners' contention that *Anderson* holds "that the fact that a particular defendant may have organized or supervised 'unwitting' participants in not enough [to apply 3B1.1]," is misleading. Defendants' motion at 58.

The court in *Anderson* declined to apply § 3B1.1 because the court below had not made a finding that the crime involved *more than one* criminally responsible individual. *Anderson*, 942 F.2d at 617. The court in *Anderson* expressed no opinion as to whether the co-defendant involved was criminally responsible, and remanded the case for such a determination. *Anderson* did not hold that five or more participants are required for § 3B1.1 to apply, nor did it hold that "unwitting participants" should not be considered when applying that section. Such a holding would have been contrary to the text and commentary of the rule. Petitioners have therefore failed to show that this court applied § 3B1.1 in error.

2. Section 2f1.1 "Double Counting" Claim

Petitioners' sentences were also adjusted upward two levels pursuant to USSG § 2F1.1 (b)(2). That section provides for upward adjustment of sentences where the crime involved "more than minimal planning." Petitioners contend that this adjustment, when combined with the adjustment pursuant to § 3B1.1 constitutes impermissible "double counting."

Petitioners' claim is contrary to established Ninth circuit law. The Ninth Circuit has held that where "different enhancements stem from different concerns, both can be simultaneously applied." *United States v. Kelly*, 993 F.2d 702, 704 (9th Cir. 1993). The holding in *Kelly* is dispositive of petitioners' claim:

> Here, the "more than minimal planning" enhancement describes the complexity of the overall

> scheme. As a sophisticated fraud, Kelly's conspiracy is more harshly punished than are simple frauds. The leadership enhancement [§ 3B1.1] addresses a somewhat different concern, namely Kelly's role within the group of coconspirators. As an organizer or leader, Kelly is more harshly punished than if he had been a follower in the same scheme. The two enhancements are sufficiently different that we see no error in applying them in the same case.

Id. Accordingly, this court did not err in calculating petitioners' sentences under the USSG.

CONCLUSION

For the foregoing reasons, petitioners' motion for a new trial, a *Franks* Hearing, and to modify their sentences is DENIED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, OCT 14 1994

/s/ Harold M. Fong
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA VS. WILLIAM D. METT AND MARVIN L. WISEMAN; CR. NO. 89-00125 HMF; ORDER DENYING DEFENDANTS' MOTION FOR NEW TRIAL, FRANKS HEARING, AND MODIFICATION OF SENTENCE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM D. METT AND MARVIN L. WISEMAN, Defendants.	) CR. NO. 89-00125 HMF) (Filed Oct. 18, 1994)

ORDER MODIFYING ORDER DATED OCTOBER 14, 1994

The order dated October 14, 1994, denying defendants' motion for a new trial, *Franks* hearing, and modification of their sentences, contains an inconsistency. On page six, first full paragraph, the order incorrectly states that Cassiday appeared in court on behalf of Center Art in February and March 1989. The sentence should read as follows:

> The record indicates that Cassiday appeared in court on behalf of Center Art in February and *May 1989*, and on behalf of Osborne in February, March, and April 1989.

This correction is consistent with the dates contained in the first full paragraph on page five, which remains unchanged:

> Cassiday filed a *pro hac vice* motion on behalf of Center Art on February 23, 1989. *See* defendants' motion at Exhibit A. Cassiday did not again

appear on behalf of Center Art until May 1989, well after his limited representation of Osborne concluded.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, OCT 18 1994

/s/ Harold M. Fong
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA VS. WILLIAM D. METT AND MARVIN L. WISEMAN; CR. NO. 89-00125 HMF; ORDER MODIFYING ORDER DATED OCTOBER 14, 1994